PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports for September.

Bicycles, Injury to Pedestrian, Negligence, Evidence

When a bicyclist comes up behind a pedestrian, who is unconscious of his approach, and is walking on a path beside a highway, without giving any warning of his approach, and strikes the pedestrian with his bicycle, the burden rests on the bicyclist to show that he was free from negligence, in order to relieve himself from liability: *Myers* v. *Hinds*, (Supreme Court of Michigan,) 68 N. W. Rep. 156.

Conflict of Laws, Courts, Jurisdiction, State and Federal, Consul of Foreign Nation

Under the second section of Article 3 of the Constitution of the United States, which provides that the judicial power of the United States shall extend to all cases affecting ambassadors, other public ministers, and consuls, a state court has no jurisdiction in a civil case over the person of a consul of a foreign government resident in the state, irrespective of the repeal of the judiciary act of 1789: *Wilcox* v. *Luco*, (Supreme Court of California,) 45 Pac. Rep. 676. To the same effect are *Davis* v. *Packard*, 7 Pet. 276, 1833; *Miller* v. *Van Loben Sels*, 66 Cal. 341; S. C., 5 Pac. Rep. 512, 1885.

Constitutional Law, Election of Officers, Appointment, Minority Representation

The Laws of New York of 1896, c. 427, § 1, created a board of four police commissioners for the city of Albany, to be elected by the common council, and provided that not more than two of them should belong to the same political party; that for the purpose of such election, the members of the council attending the meeting should constitute a quorum; that each member of the council should be entitled to vote for not more than two commissioners; that if a vacancy should occur in the board of police commissioners, it should be filled by appointment by the mayor, on the written recommendation of

a majority of the members of the common council belonging to the same political party as the commissioner whose office should become vacant; and that no person should be eligible to the office of police commissioner unless he was a member of the political party having the highest or next highest representation in the common council. In *Rathbone* v. *Wirth*, 40 N. Y. Suppl. 535, this statute was held unconstitutional by the Supreme Court of New York, (Appellate Division, Third Department,) on the ground that it infringed the rights of the majority to govern by giving the minority equal power with the majority in the selection of police commissioners; that the power of the legislature to determine the method of filling a newly-created office does not go to the extent of permitting it to prescribe a method by which the right of the majority of the electors to select the officer may be defeated; and that the act could not be sustained on the ground that it secured minority representation, since it put the minority on an equality with the majority. Landon, J., dissented.

Submission of Question to Voters, Injunction

In *State* v. *Thorson*, 68 N. W. Rep. 202, the Supreme Court of South Dakota has recently decided, (1) That under Laws S. Dak. 1891, c. 57, § 12, which provides that "Whenever any proposed constitution or constitutional amendment or other question is to be submitted to the people of the state for popular vote, the secretary of state shall . . . . certify the same to the auditor of each county in the state," it is the duty of the secretary to certify a question directed by the legislature as to whether a provision of the constitution shall be repealed, though an affirmative answer by the people would not affect the constitution, and the submission is therefore practically useless; (2) That an injunction to enjoin the submission of a constitutional amendment to the vote of the people because the submission is invalid will not lie merely at the instance of a taxpayer and elector, since the taxpayer will receive no substantial injury from such submission; and (3) That the courts have no jurisdiction to prevent the submission to the people, as directed by the legislature, of a question involving an amendment to the constitution, by enjoining the secretary

of state from certifying the question to the county auditors, as such action would be an unwarranted interference with the authority of the legislature.

Corporations, Failure to File Annual Statement, Liability of Stockholder, Existing Debt

A debt arising on a contract for the purchase of goods, entered into in November, 1891, but under which there is no delivery until October, 1892, is not, prior to such delivery, an existing debt, within the meaning of a statute (Pub. Stat. R. I. c. 155, §§ 11, 12,) providing that upon the failure of a manufacturing corporation to file a statement of its condition on or before a certain day in each year the stockholder shall be liable for any debt of the corporation then existing, for this liability not being contractual, but purely statutory, and in derogation of the common law, the statute must be strictly pursued: *Wing* v. *Slater*, (Supreme Court of Rhode Island,) 35 Atl. Rep. 302.

Insolvency, Preferred Claims

A bookkeeper of a corporation, who has no pecuniary interest therein, though elected to a vacancy in the board of directors, and made a nominal holder of stock for that purpose, is entitled to preference on the insolvency of the corporation, under Act N. J. 1892, P. L. 426, which provides that "the laborers and workmen, and all persons doing labor or service of whatever character in the regular employ of such corporation, shall have a first and prior lien:" *Consolidated Coal Co.* v. *Keystone Chemical Co.*, (Court of Chancery of N. J., Pitney, V. C.,) 35 Atl. Rep. 157.

Meetings, Voting, Principal and Agent, Powers of Agent

According to a recent decision of the Supreme Court of Alabama, authority to an agent to vote at a corporate meeting upon the stock of his principal does not empower the agent to act for his principal in connection with the other stockholders, who were also creditors of the corporation, in regard to the cancellation of a mortgage of the corporation, given to secure claims of the principal and those stockholders against the corporation: *Moore* v. *Ensley*, 20 So. Rep. 744.

It is not *ultra vires* for a manufacturing corporation to pur-

chase a large tract of land for the purpose of erecting thereon its factories and residences for its employes, and to contribute toward the establishment there of a church, a school, a free library, and a free bath for its employes: *Steinway* v. *Steinway & Sons*, (Supreme Court of New York, Special Term, New York County,) 40 N. Y. Suppl. 718.

Ultra Vires, Providing Residences, etc., for Employes

After a jury has been impaneled and sworn in a criminal case, the trial cannot stop short of a verdict without the consent of the defendant, except for imperative reasons, such as the illness of a juror, the judge, or the defendant, the absence of a juror, or a disagreement, and, therefore, when a case, after the trial has commenced, is withdrawn from the jury on account of the absence of a witness for the state, the defendant has been once placed in jeopardy, and may plead it in bar of another trial, unless he consents thereto; and such consent is not established by the mere fact that a defendant without counsel does not object to the withdrawal of the case from the jury, and the postponement of the trial, nor will that fact constitute a waiver of his right to plead the withdrawal in bar of another trial for the same offence: *State* v. *Richardson*, (Supreme Court of South Carolina,) 25 S. E. Rep. 220.

Criminal Law, Twice in Jeopardy, Withdrawal of Case from Jury, Consent

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The principles on which the enforcement of building restrictions contained in a deed depend, have recently been thoroughly examined and defined by Vice Chancellor Emery, of the Court of Chancery of New Jersey, in *Trout* v. *Lucas*, 35 Atl. Rep. 153. He holds (1) That when a tract of land is laid out by the owner into lots and blocks for sale, in accordance with a general scheme, by which restrictions as to building are imposed on each purchaser, for the benefit of all the land, and these restrictions are embodied in the conveyances, the right of one lot owner to enforce the covenant against another is not a legal, but a purely equitable one; and being such, the restrictions will only be enforced when it would be equitable

Deed, Building Restrictions, Waiver, Laches

to do so; and (2) That a court of equity will not require the removal of a building, on the ground that it is in violation of a covenant in the deed of the owner, when his grantor and the owners of other lots permitted its erection without objection; and subsequent purchasers are bound by the acquiescence or laches of their grantors.

In the case in hand, the deeds to lots in a tract of land contained covenants that the grantees should not build thereon nearer than twenty-five feet to certain streets; but a purchaser erected a building less than twenty-two feet distant from the street, and six years later added a tower to the building, extending to within about eleven feet of the street. No objection was made by the grantor or other owners when the building and tower were erected. The complainant, who bought his lots at about the same time that the tower was erected, and made no objection to the encroachment at the time, brought suit about three years later for a mandatory injunction to remove so much of the building as stood within twenty-five feet of the street; but this was refused.

Deposit of Public Funds, Loan

In the opinion of the Supreme Court of South Dakota, a general deposit of public funds by a public officer subject to check, is not a "loan" within the statutory and constitutional prohibition against the loaning of public funds, with or without interest: *Allibone* v. *Ames*, 68 N. W. Rep. 165.

Donatio Causa Mortis, Delivery

According to a recent decision of the Queen's Bench Division, the rule that delivery of a chattel is essential to constitute a valid *donatio causa mortis* is satisfied by an antecedent delivery of the chattel to the donee, though *alio intuitu*: *Cain* v. *Moon*, [1896] 2 Q. B. 283.

Elections, Appointment, Vacancies, State Officers, Presidential Electors

The Court of Appeals of Kentucky has lately held that presidential electors are state officers, within the meaning of a constitutional provision, (Const. Ky. § 152,) which provides that if the unexpired term of an elective officer does not end at the next succeeding annual election at which either city or state officers, etc.,

are elected, and three months intervene before such election, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election: *Todd* v. *Johnson*, 36 S. W. Rep. 987.

Qualifications of Voters, Ownership of Real Estate

In answer to a communication from the Governor, the Supreme Court of Rhode Island has declared that under the Constitution of Rhode Island, Art. 2, § 1, which provides that an elector who is to be qualified to vote by reason of ownership of real estate shall be "one who is really and truly possessed in his own right of real estate, ... being an estate in fee simple, fee tail, for the life of any person, or an estate in reversion or remainder which qualifies no other person to vote," the owner of an equitable estate in land is not a qualified elector: *In re Qualifications of Electors*, 35 Atl. Rep. 213.

Electric Railways, Negligence, Master and Servant

In a recent case before the Supreme Court of Errors of Connecticut, *McAdam* v. *Central Ry. & Electric Co.*, 35 Atl. Rep. 341, the defendant, an electric street railway and light company, had constructed its railway in such a manner that the support and span wires, which passed over the trolley wire, might become dangerous by contact with the latter, unless properly insulated. The plaintiff, a lineman of the company, received an electric shock on taking hold of a support wire, due to the fact that a span wire, which was not insulated, had come in contact with the trolley wire, and was thrown to the ground and injured. In an action by him to recover damages, it was held that a finding that the company was guilty of negligence rendering it liable for the injuries received by the plaintiff was proper.

Equitable Assignment, Compensation of Executor

In the opinion of the Supreme Court of Michigan, an assignment by an executor appointed by the probate court, who has secured the probate of the will, of compensation to be earned in defending against an appeal, is void as against public policy: *In re King's Estate*, 68 N. W. Rep. 154.

In *Norton* v. *Dashwood*, [1896] 2 Ch. 497, Justice Chitty, of the Chancery Division, has lately held, that tapestry which had been cut and pieced so as to cover the walls of a room and the space left by the doors and mantelpiece, and was hung by being nailed to wooden buttons let into the plaster and nailed to the brick-work, passed as a fixture under a devise of the mansion-house.

Fixtures, Tapestry, Devise

This decision was based upon *D'Eyncourt* v. *Gregory*, 3 L. R. Eq. 382, 1866, where a testator, who was tenant for life of settled estates, on which he had erected, fitted up, and furnished a mansion-house, (an old one having fallen into decay,) bequeathed all the tapestry, marbles, statues, pictures with their frames and glasses, which should be in or about the house at the time of his death, and of which he had power to dispose, to be enjoyed as heir-looms by the person who, under the limitations in his will, would be entitled to his own estates thereby devised in strict settlement, being the same as those entitled to the settled estates, subject to a condition, with a shifting clause in case the condition was not fulfilled. After the testator's death, A. became tenant for life of both the settled and devised estates, and on his death the settled estates devolved on B.; but, as the condition was not fulfilled, C. became entitled to the devised estate, and to the heir-looms under the shifting clause in the testator's will. The question arose, as between B. and C., which of the articles passed under the will; and it was held, that tapestry, pictures in frames, frames filled with satin, and attached to the walls, and also statues, figures, vases and stone garden-seats, purchased and set in place by the testator, which were essentially part of the house, or of the architectural design of the building or grounds, however fastened, were fixtures, and could not be removed; but that glasses and pictures not in panels, not being part of the building, and articles purchased by the testator, but fixed in place by A. after his death, were not fixtures, and passed to C., under the will.

The Supreme Court of Michigan, abandoning the views expressed in *People* v. *O'Neil*, 71 Mich. 325; S. C., 39 N. W.

Game Laws, Prohibition of Sale or Possession, Constitutionality of Laws

Rep. 1, holds now that an act (Laws Mich. 1893, No. 196, § 5,) which prohibits the sale or possession for the purpose of sale of any kind of bird, game, or fish, at any time when the taking, catching, or killing thereof is prohibited by law, and another (Laws Mich. 1895, No. 223,) prohibiting the sale of quail at any time, apply to the sale or possession of game killed out of the state, and are not unconstitutional, as interfering with interstate commerce, but are a valid exercise of the police power of the state: *People* v. *O'Neil*, 68 N. W. Rep. 227.

This view has unfortunately been adopted by the weight of authority: *Whitehead* v. *Smithers*, 2 C. P. D. 553, 1877; *Ex p. Maier*, 103 Cal. 476, 1894; *Magner* v. *People*, 97 Ill. 320, 1881; *State* v. *Randolph*, 1 Mo. App. 15, 1876; *State* v. *Rodman*, 58 Minn. 393, 1894; *N. Y. Assn. for Protection of Game* v. *Durham*, 51 N. Y. Super. Ct. 306, 1885; *Roth* v. *State*, 51 Ohio St. 209, 1894, affirming 7 Ohio Cir. Ct. 62, 1893; and has been applied to the keeping of game in cold storage: *State* v. *Judy*, 7 Mo. App. 524, 1879; and to the catching of trout artificially propagated: *Comm.* v. *Gilbert*, 160 Mass. 157, 1893; though how it can be held that a statute which forbids the bare possession of such game is constitutional, passes any ordinary mind to discover. When the prohibition is of possession for the purpose of sale, as in the principal case, such an act is of course constitutional; and it will not be construed to apply to imported game sold in the original package: *Ex p. Maier*, 103 Cal. 476, 1894.

The minority doctrine, that such a statute cannot be intended to apply to imported game, since its object is the preservation of game within the limits of its own authority, is more conducive to justice and more consonant with sound reason; especially in view of the fact that the close seasons differ in different states, so that the killing may be lawful: *Comm.* v. *Hall*, 128 Mass. 410, 1880; *Comm.* v. *Wilkinson*, 139 Pa. 298, S. C., 27 W. N. C. 160, 21 Atl. Rep. 14, 1891; see *Allen* v. *Young*, 76 Me. 80, 1883. But this, though once upheld by it: *People* v. *O'Neil*, 71 Mich. 325,

S. C., 39 N. W. Rep. 1, 1888, the Supreme Court of Michigan, for some reason, has seen fit to abandon.

Guaranty, Collateral Undertaking, Statute of Frauds

In a recent case before the Supreme Court of California, the defendant, who was an officer of a corporation and a large stockholder therein, with the intent of relieving the demands of other creditors, urged the plaintiff to invest $1,500 in the stock of the corporation, and verbally agreed with him that he should buy the stock and pay the price thereof to the company, and that in the event of the stock becoming worthless, he, (the defendant,) would repay to the plaintiff the price paid for the stock. This was held to be an original contract, and therefore not within the statute of frauds: *Kilbride* v. *Moss*, 45 Pac. Rep. 812.

Homicide, Excusable

When several persons attack another, intending merely to frighten and beat him, and not to do him any severe bodily harm, but the person so assailed has reasonable ground to believe, from the nature of the attack and the surrounding circumstances, that there is a design to kill him, and so believing shoots and kills one of his assailants, the homicide is justifiable: *State* v. *Lima*, (Supreme Court of Louisiana,) 20 So. Rep. 737.

Homicide, Corpus Delicti

According to a recent decision of the Supreme Court of South Carolina, when the body of a murdered man was burned and mutilated beyond recognition, testimony that a piece of charred cloth, found among the ashes with the deceased, was like the cloth of which the trousers he wore at the time of his disappearance were made, and that a slate pencil found there was identical with one carried by the deceased, and known to be such by a certain indentation on the side, was competent evidence to establish the identity of the body, its sufficiency being for the jury: *State* v. *Martin*, 25 S. E. Rep. 113.

Horse Racing, Evasion of Statute

The Supreme Court of Indiana has again scotched the schemes of the sporting fraternity to evade the provisions of the Roby Race-Track Law of March 5, 1895, P. L. 92, which provided (§ 1) that there shall be no horse-racing from November 15th to April 15th

in every year; (§ 2) that "it shall be unlawful for any person, corporation, company or association to hold or advertise for a race meeting oftener than three times in any year, and no race meeting shall be held longer than fifteen days. It shall be unlawful to hold any race meeting oftener than twice in any period of sixty days, and it shall also be unlawful to hold any race meeting until after the full period of thirty days has elapsed after a meeting has been held;" prescribes penalties for the violation of its provisions, and gives a remedy by injunction against threatened violations of the act (§ 4.) The first attempt to evade this statute was by organizing three several companies or associations to hold race meetings alternately upon the same track, so that they might each hold a race meeting on the Roby race track for the statutory period of fifteen days, and in such order that, when each association came to hold its second and every subsequent race meeting, there would be a space of thirty full days between each of its meetings, and thus make the race meeting continuous from the 15th of April to the 15th of November of each year. Action was brought against those interested in the association to recover the statutory penalty; and the lower court held the evasion legal, and sustained a demurrer to the complaint. This judgment was reversed by the Supreme Court, which held that it made no difference whether the second or other subsequent meeting held within the thirty days was held by the same party that held the former meeting or by a different party, company or association, and construed the statute to forbid a race meeting to be held for a longer period than fifteen days at one time and less than thirty days subsequent to the last race meeting held at the same place, regardless of the person, company or association holding either of such meetings: *State* v. *Roby*, 142 Ind. 168, S. C., 41 N. E. Rep. 145, 1895. That decision "seems to have been cheerfully acquiesced in by the people attempting to carry on race meetings in Lake county. But a striking coincidence occurs. No sooner was the former decision finally confirmed, than arrangements were set on foot, not only to continue the race business

at Roby, but arrangements were made to construct two other race tracks as close to Roby as they could conveniently be made." These tracks were constructed, one separated from Roby by a highway only, and the other less than half a mile away. The state, through the attorney general, brought suit for an injunction under the act against the owners of the three tracks. The evidence of the defendants, the proprietors of these tracks, showed that horse racing was profitable only when horses could be kept together for a long period; that the arrangement between the proprietors of the three tracks was that Roby should open and run for fifteen days, then Forsythe for the next fifteen days, and then Sheffield for the next fifteen days, thus leaving a period of thirty days since Roby closed, and that then the merry-go-round should begin again; that only one track should be open during the fifteen days that another was running; that the same judge acted at all the tracks, the same horses were entered, and at the end of the fifteen days the meeting was simply transferred from one track to another; and that the horses remained located in the various barns in which they were quartered without regard to the particular track on which they might be racing. Yet the same judge refused the temporary injunction prayed for and on the final hearing found for the defendants, and refused a motion for a new trial made by the plaintiff. This judgment was of course reversed, the Supreme Court holding that the three successive meetings, though held on separate tracks owned and controlled by separate companies or associations, under the evidence constituted but one race meeting, and were within the prohibition of the statute; and that the finding of the trial court that the races conducted at each track constituted a separate and distinct race meeting, was in effect a conclusion of law, and not of fact, and was therefore open to review and correction on appeal: *State* v. *Forsythe*, 44 N. E. Rep. 593.

A policy which insures against loss or damage to property, whether owned by the insured or others, for which the insured

Boiler Insurance, Nature of Contract

may be liable, resulting from the explosion of a steam boiler, and also against loss of life or injury to persons, whether employes of the insured or strangers, caused by such explosion, payable to the insured for the benefit of such persons or their legal representatives, is a contract of indemnity, and a person injured by such an explosion cannot sue the insurance company: *Embler* v. *Hartford Steam Boiler Inspection & Insurance Co.*, (Supreme Court of New York, Appellate Division, Third Department,) 40 N. Y. Suppl. 450.

Marine Insurance, Freight, Commencement of Risk, Engagement of Goods, Loading Port

The Court of Appeal of England has recently decided a very interesting question of marine insurance, on appeal from a decision of Gorell Barnes, J., (*The Copernicus*, [1896] P. 154). By a policy on freight, "at and from any port or ports of loading on the west coast of South America to any port or ports of discharge in the United Kingdom," the freight was to be covered "from the time of the engagement of the goods." Goods were engaged for the vessel which was to carry the freight, and were ready for shipment in her at the time of her loss, which occurred before she arrived at her first loading port on the west coast of South America. The owners of the vessel sued for the insurance on the freight, but judgment was given for the defendant; and this was affirmed by the Court of Appeal, on the ground that the "engagement" clause must be construed with reference to the voyage described in the policy, and that, therefore, as the vessel had not arrived at her first loading port on the west coast of South America, the risk had not attached: *The Copernicus*, [1896] P. 237.

Intoxicating Liquors, Sale

In the opinion of the Supreme Court of Georgia, a *bona fide* "loan" of a pint of whisky by one person to another, without any criminal intent, the borrower agreeing to return to the "lender" another pint of the same kind of whisky, which he in fact does, is not a sale of the whisky within the statute prohibiting the sale of intoxicating liquors, though the whisky "lent" was intended to be

and was consumed by the borrower: *Skinner* v. *State*, 25 S. E. Rep. 364.

Jury, Misconduct

A statement by a juror to his fellow jurors, that he was a member of a grand jury which indicted the defendant for another crime, which he described, will vitiate the verdict: *Ryan* v. *State*, (Supreme Court of Tennessee,) 36 S. W. Rep. 930.

In *Thomas* v. *Bowen*, 45 Pac. Rep. 768, the Supreme Court of Oregon lately ruled that the following newspaper item was libelous *per se*:

Libel

"Charged with Larceny.

"Mrs. Flora Thomas, colored, in the Toils.

"The arrest of Mrs. Flora Thomas, a colored domestic in the employ of Fannie Hall, the brothel keeper, took place yesterday by constable Snow, on a warrant charging her with larceny from a dwelling. The woman has only been in the employ of Fannie Hall a short time, but long enough, it seems, for her to ply her kleptomaniac tendencies to their full measure. Numerous articles were missed from the house at various times, until finally her apartments in a house on an adjoining block were searched, and the stolen property found. The woman was taken before Justice Bentley, who allowed the woman to go on her own recognizance until her preliminary examination was called to-day."

Master and Servant, Fellow-Servant

According to a recent decision of the Circuit Court of Appeals of the Ninth Circuit, a local telegraph operator at a station on the line of a railroad, who receives and delivers the orders of a train dispatcher in respect of the movement of trains, is the fellow-servant of the employes of the railroad company in charge of the trains; and such employes, if injured in consequence of his negligence, cannot recover damages from the railroad company: *Oregon Short Line & U. N. Ry. Co.* v. *Frost*, 74 Fed. Rep. 965. Hawley, D. J., dissented, with much reason. The operator in this case did not have a single badge of the rela-

tion of fellow-servant, except that he was apparently in the employ of the company.

Mortgage Bonds, Lien, Priority

The Supreme Court of Ohio holds, that when bonds secured by one and the same mortgage on corporate property are issued at different times, the liens of all the bonds outstanding in the hands of *bona fide* purchasers for value are equal in priority, since the lien of each bond dates from the record of the mortgage that secured it, and not from the time it was issued: *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Lynde*, 44 N. E. Rep. 596.

Post Office, Stamps, Die for Making Fictitious Stamp, Possession, Liability

The following decision may prove of interest to stamp-collectors. The statute of 47 & 48 Vict. c. 76, § 7, provides that "a person shall not (*a*) make, knowingly utter, deal in or sell any fictitious stamp, or knowingly use for any postal purpose any fictitious stamp, or (*b*) have in his possession, unless he shews a lawful excuse, any fictitious stamp, or (*c*) make, or, unless he shews a lawful excuse, have in his possession, any die, plate, instrument, or materials for making any fictitious stamp," prescribes a penalty for violation of its provisions, and declares that "for the purpose of this section 'fictitious stamp' means any facsimile or imitation or representation, whether on paper or otherwise, of any stamp for denoting any rate of postage, including any stamp for denoting a rate of postage of any of her Majesty's colonies, or of any foreign country." The proprietor of a newspaper that circulated among stamp-collectors and others caused a die to be made for him abroad, from which imitations or representations of a current colonial postage-stamp could be produced. The only purpose for which he ordered the die, and kept it in his possession, was in order to make upon the pages of an illustrated stamp catalogue or newspaper, called "The Philatelist's Supplement," illustrations of the colonial stamp in black and white only, and not in colors, this special supplement being intended for sale as part of his newspaper. He was informed against under the statute; and the magistrate

stated the case for the opinion of the Queen's Bench Division, which held that the possession of a die for making a false stamp, known to its possessor to be such, was, however innocent the use that he intended to make of it, a possession without lawful excuse within the meaning of the act: *Dickins* v. *Gill*, (Queen's Bench Division,) [1896] 2 Q. B. 370.

This decision seems hardly consonant with sound reason. If the fact that he intended to use the die for the purpose stated, and no other, was not a lawful excuse, one wonders what could be; and further, the whole tone of the statute seems to be that only those stamps and dies are within its purview which are intended for unlawful use in paying postage on mail matter.

Public Contracts, Award, Lowest Responsible Bidder, Mandamus

The Supreme Court of South Dakota has added itself to the list of those that hold that since the duty of a public officer or board entrusted with the letting of public contracts to the lowest responsible bidder is not merely a ministerial one, but involves the exercise of discretion, their judgment in awarding such contracts cannot be controlled by mandamus; and also holds, as a matter of course, that since the issue of a peremptory mandamus in such a case is erroneous, a commitment for a refusal to comply therewith is a nullity: *In re McCain*, 68 N. W. Rep. 163.

See, on this subject, 33 AM. L. REG. N. S. 899; 34 AM. L. REG. N. S. 71.

Public Officers, Salaries, Reduction, Constitutional Law

According to a recent decision of the Court of Appeals of Kentucky, *City of Louisville* v. *Wilson*, 36 S. W. Rep. 944, the members of the boards of public safety and public works, the secretaries of the boards, the assistant bailiff of the police court, and the stenographer of the city court, are "officers" within the meaning of the constitutional provision that the salaries of public officers shall be neither increased nor diminished during their term of office; and an ordinance reducing the salaries of those officers, during their term of office, is therefore unconstitutional and void; but a statute providing that the salary of

an officer shall be "not less than" a certain sum does not fix it at that sum, and therefore an ordinance passed after their appointment, fixing their salaries at a higher figure than those sums, is not unconstitutional.

Public Contracts, Rights of Lowest Bidder, Action for Profits

The Supreme Court of Michigan has recently decided, that though a city charter requires contracts to be let to the lowest bidder, the lowest bidder under a proposed contract, whose bid has been rejected, has no right of action against the city to recover the profits which might have been made had his bid been accepted: *Talbot Pav. Co.* v. *City of Detroit*, 67 N. W. Rep. 979.

Railroads, Crossings, Electric Bell, Negligence, Contributory Negligence

In a recent case before the Supreme Court of Michigan, *Tobias* v. *Mich. Cent. R. R. Co.*, 68 N. W. Rep. 234, where the plaintiff's intestate was injured in an accident at a railroad crossing, the evidence showed that the company maintained an electric bell at the crossing, which was rung automatically by passing trains, but was often out of order and did not ring properly, and was in that condition when the plaintiff's intestate was injured. It also appeared that a train approaching the crossing could be seen for a long distance. The trial judge instructed the jury that if there had been no bell it would not have been prudent to cross the track without first looking; that the presence of the bell did not release the deceased from the duty of exercising due care; that the question was how far the deceased, as a prudent man, was entitled to rely on the bell; and that, if he had looked, he could have seen the coming train. It was held, in error, that these instructions properly presented the issues.

Tickets, Coupons, Construction

A railroad ticket entitling a designated person to a stated number of single continuous trips, for each of which a separate coupon is attached, "between" two specified stations, which stipulates that "passage shall be taken only on such trains as stop at the above-named stations," and also that "this ticket shall be good only

for continuous trips between" those stations, confers on the holder of the ticket the right, upon surrendering one of the coupons, to ride from an intermediate station to either of the two stations mentioned in the ticket, or from either of those stations to the intermediate station, provided he boards a passenger train that, upon its regular schedule, stops at the intermediate station as well as the two specified stations: *Georgia R. R. & Banking Co.* v. *Clarke*, (Supreme Court of Georgia,) 25 S. E. Rep. 368.

Railroad Mortgages, Claims for Tort, Priority

The Supreme Court of Georgia, in a very able and exhaustive opinion, (but regrettably marred by an unnecessary flippancy of tone in some paragraphs,) has torn itself loose from the trammels of authority, which would postpone a claimant for damages for a tort to the lien of mortgage bondholders of a corporation, and adopted a doctrine which seems thoroughly in accord with the principles of justice. It holds that when judgment on a claim against the mortgagor for a tort has been obtained before the mortgage is foreclosed or a receiver appointed, the damages so reduced to judgment should be regarded as operating expenses charged by the judgment upon income as against the mortgages and all their incidents, and should take precedence of such claims in a decree for the distribution of income: *Green* v. *Coast Line R. R. Co.*, 24 S. E. Rep. 814.

Savings Banks, By-Laws, Payment of Deposit

In Michigan, a by-law of a savings bank, organized under the general banking laws, and required by statute to have capital stock and stockholders, which provides that the bank shall not be liable to a depositor for payment of the moneys deposited to the holder of his pass book, though it should be stolen from the depositor, is not binding on the depositor, unless he has notice thereof; since, under the laws of that state, the officers of the bank, who make the by-laws, are agents of the bank and not of the depositor, and Pub. L. Mich. 1887, p. 233, requires that deposits shall be paid to the depositor or his personal representatives: *Ackenhausen* v. *People's Savings Bank*, (Supreme Court of Michigan,) 68 N. W. Rep. 118.

In states where a savings bank is managed by trustees for the benefit of the depositors, a different rule prevails: *Sullivan* v. *Institution*, 56 Me. 507, 1869; *Goldrich* v. *Bank*, 123 Mass. 320, 1877; *Schoenwald* v. *Bank*, 57 N. Y. 418, 1874; *Appleby* v. *Bank*, 62 N. Y. 12, 1875.

Set-off, Equitable, Pleading

Equitable set-off cannot be pleaded by way of answer, but the relief sought must be invoked by bill or cross-bill: *American Natl. Bk.* v. *Nashville Warehouse & Elevator Co.*, (Court of Chancery Appeals of Tennessee,) 36 S. W. Rep. 960.

Shipping, Bill of Lading, Excepted Perils, Restraint of Princes, Contraband of War, Risk of Seizure, Part Performance of Contract of Carriage, Refusal to Complete, Discharge at Intermediate Port, Justification

In a recent case in the Queen's Bench Division, tried before Mathew, J., without a jury, the plaintiffs shipped goods which were contraband of war on the defendants' ship for carriage from London to Yokohama, under a bill of lading containing the exception of "restraint of princes," and also a special clause "that if the entering of or discharging in the port (of discharge) shall be considered by the master unsafe by reason of war . . . . the master may land the goods at the nearest safe and convenient port." The ship also carried goods belonging to other shippers. In the course of her voyage the ship arrived at Hong Kong, and on the day of her arrival there, war was declared between China and Japan. There were, at the time, several Chinese war vessels in and around the port of Hong Kong, and if the master had attempted to sail thence with the plaintiff's goods on board, there would have been a serious danger of their seizure and confiscation. The master, accordingly, landed them there. The plaintiffs brought an action for breach of contract to carry the goods to Yokohama. But the court held, (1) that risk of seizure of the goods, if it was attempted to carry them further, amounted to a "restraint of princes," within the exception; (2) that such risk of seizure, on the voyage between Hong Kong and Yokohama, rendered the entering of or discharging in the port of Yokohama

unsafe within the meaning of the special clause; and (3) that the master's duty to take care of the cargo justified him, apart from any exceptions in the bill of lading, in landing the plaintiff's goods where he did: *Nobel's Explosives Co.* v. *Jenkins & Co.*, [1896] 2 Q. B. 326.

Sleeping-car Companies, Duty to Passengers, Liability

A sleeping-car company, though not a common carrier, owes its passengers certain general duties, arising from the contracts which it makes with them, and involving the exercise of ordinary and reasonable care and attention towards them, and a violation of these duties may be made the subject of an action either *ex contractu* or *ex delicto;* and in an action against a sleeping-car company for failure to discharge its duty to provide a properly-warmed and comfortable car for its passengers, it cannot be said, on demurrer, that damages alleged to have been caused by such failure, consisting in suffering from the low temperature, and the contracting a violent cold, which resulted in permanent injury to the eyes, are so remote as not to be recoverable: *Hughes* v. *Pullman Palace Car Co.*, (Circuit Court, E. D. Missouri, N. D.) 74 Fed. Rep. 499.

Will, Construction, Falsa Demostratio

In a recent case before North, J., of the Chancery Division of the High Court of Justice of England, a testatrix, who had bequeathed all her shares in two specified railway companies, had never owned any shares in either, but at the date of her will held debenture stock of each company, which she continued to hold at the time of her death; and it was held that the debenture stock passed under the bequest: *In re Weeding*, [1896] 2 Ch. 364.

Ardemus Stewart.